

FILED

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MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

2004 JUL 13 P 12:15

United States District Court	District Massachusetts COURT
Name (under which you were convicted): <u>Elvin Mercado,</u>	Docket or Case No.: <u>1:02CR10259-PBS</u>
Place of Confinement: <u>FMC Devens, Ayer, MA 01432</u>	Prisoner No.: <u>24448-038</u>
UNITED STATES OF AMERICA	Movant (include name under which you were convicted) <u>v.</u> <u>Elvin Mercado, #24448-038</u>

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: _____
United States District Court/ District of Massachusetts
One Courthouse Way,
Boston, Massachusetts 02210
- (b) Criminal docket or case number (if you know): 1:02CR10259-001-PBS
2. (a) Date of the judgment of conviction (if you know): July 22nd, 2003

(b) Date of sentencing: July 22nd, 2003
3. Length of sentence: 188 months/6 yrs Sup. Rel.
4. Nature of crime (all counts): Conspiracy to distribute heroin
Title 21 U.S.C. § 846
Distribution of heroin
Title 21 U.S.C. § 841(a)(1)
Aiding and abetting
Title 18 U.S.C. § 2
5. (a) What was your plea? (Check one)

(1) Not guilty (2) Guilty (3) Nolo contendere (no contest)

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to? _____
N/A
6. If you went to trial, what kind of trial did you have? (Check one) Jury Judge only

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7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes No

8. Did you appeal from the judgment of conviction? Yes No

9. If you did appeal, answer the following:

(a) Name of court: _____ N/A

(b) Docket or case number (if you know): _____ N/A

(c) Result: _____ N/A

(d) Date of result (if you know): _____ N/A

(e) Citation to the case (if you know): _____ N/A

(f) Grounds raised: _____ N/A

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes No

If "Yes," answer the following:

(1) Docket or case number (if you know): _____ N/A

(2) Result: _____ N/A

(3) Date of result (if you know): _____ N/A

(4) Citation to the case (if you know): _____ N/A

(5) Grounds raised: _____ N/A

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: _____ N/A

(2) Docket or case number (if you know): _____ N/A

(3) Date of filing (if you know): _____ N/A

(4) Nature of the proceeding: _____ N/A

(5) Grounds raised: _____ N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes No

(7) Result: _____ N/A

(8) Date of result (if you know): _____ N/A

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: _____ N/A

(2) Docket or case number (if you know): _____ N/A

(3) Date of filing (if you know): _____ N/A

(4) Nature of the proceeding: _____ N/A

(5) Grounds raised: _____ N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes No

(7) Result: _____ N/A

(8) Date of result (if you know): _____ N/A

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes No (2) Second petition: Yes No

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: _____
N/A

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: The Petitioner was enhanced to "career offender" for a prior "Unconstitutional conviction" that is under review.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
In 1994, the Petitioner was convicted of two drug possession charges in the Lowell District Court, (Nos. 9411CR2750 & 9411CR2855). This prior conviction is currently under review pursuant to several Constitutional claims. On February 24th, 2004, the Petitioner challenged this conviction. If vacated, the Petitioner would no longer be a "career offender." This is an unripe issue which would greatly affect the Petitioner's current "draconian sentence." In fact, these two cases were counted as "two separate offenses" because of the two different arrest dates. They were illegally counted as being "two prior" convictions instead of simply one prior conviction.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: Trial attorney provided ineffective assistance of counsel with regards to the Petitioner's ultimate sentence.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____ N/A _____

Name and location of the court where the motion or petition was filed: _____

N/A

Docket or case number (if you know): _____ N/A _____
Date of the court's decision: _____ N/A _____
Result (attach a copy of the court's opinion or order, if available): _____
N/A _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____ N/A _____

Docket or case number (if you know): _____ N/A _____
Date of the court's decision: _____ N/A _____
Result (attach a copy of the court's opinion or order, if available): _____ N/A _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or
raise this issue: _____

GROUND TWO: Petitioner received ineffective assistance of
counsel from his trial attorney.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
Before the Petitioner was sentenced in the instant case, the
original plea agreement called for level (32) thirty-two at
criminal history category Six. When the PSI came back, it
called for a level (34) at Criminal History Category Six.
My attorney failed to contest this issue, I agreed to the
plea in order to receive the benefit of that plea, yet it
was changed, breached, and altered, and I received a higher
sentence. I felt that the plea agreement was binding.

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

N/A

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____ N/A

Name and location of the court where the motion or petition was filed: _____

N/A

Docket or case number (if you know): _____ N/A

Date of the court's decision: _____ N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(3) Did you receive a hearing on your motion, petition, or application?Yes No **(4) Did you appeal from the denial of your motion, petition, or application?**Yes No **(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?**Yes No **(6) If your answer to Question (c)(4) is "Yes," state:**

Name and location of the court where the appeal was filed: _____

N/A

Docket or case number (if you know): _____ N/A

Date of the court's decision: _____ N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____
N/A

GROUND THREE: Trial attorney promised both the Petitioner and his parents that the maximum penalty would be only five years.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):
Prior trial counsel had promised both the Petitioner and his parents that the "maximum sentence" facing the Petitioner in the instant case was only (5) five years of imprisonment.

Trial counsel convinced the Petitioner to "quickly plea guilty" in order to receive a somewhat light sentence of five (5) years of imprisonment. This was deceptive and simply a lie, the Petitioner was falsely made to believe that the maximum time faced would be five years and no more.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

Ineffective assistance of counsel

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____ N/A

Name and location of the court where the motion or petition was filed: _____

N/A

Docket or case number (if you know): _____ N/A

Date of the court's decision: _____ N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): _____

N/A

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

N/A

GROUND FOUR: _____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes No

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: _____ N/A _____

Name and location of the court where the motion or petition was filed: _____
N/A _____

Docket or case number (if you know): _____ N/A _____

Date of the court's decision: _____ N/A _____

Result (attach a copy of the court's opinion or order, if available): _____
N/A _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes No

(4) Did you appeal from the denial of your motion, petition, or application?

Yes No

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes No

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____
N/A _____

Docket or case number (if you know): _____ N/A _____

Date of the court's decision: _____ N/A _____

Result (attach a copy of the court's opinion or order, if available): _____
N/A _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____
N/A

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: _____
Ineffective assistance of counsel

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes No
If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: Unknown federal appointee

(b) At arraignment and plea: Attorney Steven Rappaport
Boston, Massachusetts

(c) At trial: N/A

(d) At sentencing: Attorney Steven Rappaport
Boston, Massachusetts

(e) On appeal: _____ N/A _____

(f) In any post-conviction proceeding: _____ Pro-Se _____

(g) On appeal from any ruling against you in a post-conviction proceeding: _____
Pro-Se _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes No

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: _____ N/A _____

(b) Give the date the other sentence was imposed: _____ N/A _____

(c) Give the length of the other sentence: _____ N/A _____

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes No

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.* My petition is timely.

[15 blank lines]

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: _____
Vacate the sentence and re-sentence the Petitioner, or
grant relief that is both just and proper
or any other relief to which movant may be entitled.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct
and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on _____
7-9-04 (month, date, year).

Executed (signed) on 7-9-04 (date).

Elvin Mercado
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not
signing this motion. The movant signed this petition.

IN FORMA PAUPERIS DECLARATION

Elvin Mercado

[Insert appropriate court]

United States District Court
for the District of Massachusetts